

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 94-127-4
	:	
v.	:	CIVIL NO. 99-5381
	:	
SALVATORE SPARACIO	:	

MEMORANDUM

BUCKWALTER, J.

January 22, 2001

Petitioner has filed a § 2255 Motion asserting as his ground for relief,
denial of effective assistance of counsel.

He lists eight specific ways in which counsel was ineffective in his
Amended Motion to Vacate:

(a) counsel prevented Petitioner-Movant from exercising his
constitutional right to testify in his own defense;

(b) counsel failed to move for a severance even though it was adduced at
trial Petitioner-Movant was under a death threat from some of his co-defendants
and Petitioner-Movant would be prejudiced by evidence presented to prove
twenty-eight of the thirty-two racketeering acts, often violent racketeering acts,
with which Petitioner-Movant was not charged;

(c) counsel failed to interview government witnesses O'Doherty, O'Hanlon, Forshey, Bellocchio, and Morelli and adequately prepare for trial resulting in a failure to properly cross-examine witnesses;

(d) counsel failed to present exculpatory evidence, specifically counsel did not play any of the seventeen (17) tapes on the list he gave the Petitioner-Movant shortly before trial on a sheet of paper with the heading "Tapes Introduced To Date We Will Use" (Exhibit "A");

(e) counsel failed to adequately consult with Petitioner-Movant before trial by meeting with the Petitioner-Movant for a total of less than two hours before trial;

(f) counsel failed to request jury instructions in line with counsel's own strategy that Petitioner-Movant had the right not to testify and the jury should not hold that against him;

(g) counsel disregarded Petitioner-Movant's letter of July 26, 1997 (Exhibit "B"), read to counsel by Petitioner-Movant over the telephone expressing a concern for lack of communication between Petitioner-Movant and counsel during the appeal process and requesting the filing of a supplemental brief, failed to send Petitioner-Movant a draft of his actual appeal before filing same as requested, failed to honor a request by Petitioner-Movant to include a list of issues stipulated by Petitioner-Movant or at least allow Petitioner-Movant to file these issues in a supplemental brief *pro se*, failed to meet face to face with Petitioner-

Movant as promised prior to filing the appeal, and failed to file the requested supplemental brief; and

(h) counsel advised Movant-Petitioner to sign a document dismissing a potentially exculpatory witness, Nicholas Perna, as a witness at trial and subsequently failed to object when Assistant U.S. Attorney Barry Gross gave testimony at trial essentially saying what Nicholas Perna would have testified, implicating Petitioner-Movant in gambling operations.

An evidentiary hearing was held on June 29, 2000, and in his post evidentiary hearing brief filed November 28, 2000, Petitioner argues only the first specific way above; namely, that counsel prevented Petitioner from exercising his constitutional right to testify in his own defense.

As to the other seven ways in which trial counsel was defective, the brief aforesaid merely states: “Petitioner relies on his proofs contained in previous submissions to the Court and testimony adduced at the evidentiary hearing.”

At the evidentiary hearing, Luis Felipe Restrepo, Esquire, trial counsel for Petitioner, testified about his legal background and also submitted an affidavit. If I find Restrepo’s testimony and affidavit to be true and correct in all respects and based upon them find that counsel did not prevent Petitioner from exercising his constitutional right to testify in his own defense. For example, in his affidavit, trial counsel states:

5. Salvatore Sparaciodecided not to testify at trial only after I had numerous discussions with him. We discussed this issue many times, including

several times during the course of the trial. Salvatore Sparacio was well aware of the law concerning the privilege against self-incrimination and the corresponding right to testify in his own behalf and present witnesses in his case in chief. He and I discussed the decision of whether or not he should testify both privately and in a group setting with the other defendants and defense attorneys. The decision was not entirely clear cut, and there were pros and cons to either option. Sparacio did inform me of his interpretation of the contents of the recordings that were utilized against him. I believed that this explanation could be advanced through cross-examination of government witnesses and through argument, rather than having the defendant take the stand and advance his interpretation. There were serious risks and disadvantages in calling Sparacio as a witness because I believed there would be extensive cross-examination of him by the government regarding the content of the tapes. I advised Sparacio that if he testified, cross-examination could range well beyond the few things he wanted to say on his own behalf on direct examination and proved disastrous to him. I also discussed with him that it might be difficult to explain the references to violence that occurred during conversations where he was present. Furthermore, I informed him that testifying at trial might be detrimental to his defense because we did not know what if any rebuttal case the government would present based upon the testimony Sparacio provided.

6. Salvatore Sparacio knew and understood that the conduct of his defense was ultimately his decision and that in the final analysis if he decided he

wanted to testify, that was his prerogative. It is true that I believed it would be a mistake for him to testify and said so to him. I told him that I felt the best chance of success at trial was by advancing the argument that Sparacio was only a bookmaker, that Stanfa did not like him, and that in fact Stanfa wanted to kill him. Rather than having Sparacio try to explain what he meant by what he said on numerous conversations that were introduced into evidence, I thought the best strategy was to try to advance Sparacio's theory by making reference to favorable comments that he made during certain conversations as well as derogatory comments that were made by others about Sparacio. That was the strategy that we utilized at trial. In preparation for trial, I spent many hours becoming thoroughly familiar with the conversations involving Sparacio because I knew these recordings were pivotal to my client's defense. Throughout my cross examination of witnesses, I made reference to numerous conversations that were favorable to my client. In addition, during my closing argument, I relied heavily on excerpts of conversations that were favorable to Salvatore Sparacio's defense.

7. At no time did I forbid Sparacio to testify, nor did I in any way interfere with his constitutional right to testify in his own defense. On the contrary, I left the decision up to him and would have called him to the witness stand in his own defense if he had decided on that course of action. When the time came, Sparacio chose not to testify. This was a decision that I supported, because I believed that it provided the greatest possibility of success at trial, while

simultaneously avoiding the dangers of arranging cross-examination. However, had he chosen otherwise, I would have called him to the witness stand.

Moreover, trial counsel underwent vigorous cross-examination on his allegedly preventing Petitioner from testifying. At one point, he answered:

And had Mr. Sparacio expressed an interest to me about taking the stand, or in our conversations about the merits of testifying, if he had told me he wanted to testify and -- and -- I wasn't going to stand in his way. To suggest that I would have stood in Mr. Sparacio's way of testifying is absurd.

And still another exchange:

Q. Isn't it true, sir, that you only convinced Mr. Sparacio to test -- not to testify after you had numerous discussions with him?

A. I never convinced him one way or the other, all right?

Q. You -- go ahead.

A. It would -- if you're retelling -- if your suggestion to me through your question is that I convinced him not to testify, I wouldn't put it that way. It was Mr. Sparacio's decision as to whether or not he was going to testify.

Q. But you told me before that he never expressed an interest in testifying.

A. That's right.

Q. So as far as you knew, it was always his intention not to testify, correct?

A. I -- I well, it's correct that I never got the impression through any conversation I had with Mr. Sparacio that he had any interest whatsoever in testifying.

Q. So as far as you know, his decision not to testify was something he maintained throughout the entire course of your involvement with him. True or false?

A. That's true.

And finally:

Q. "I advised Sparacio that if he testified, cross-examination could range well beyond the few things he wanted to say on his own behalf on direct examination"--

A. Right.

Q. --"and proved a disaster to him." So if Mr. Sparacio didn't want to testify, or you got the sense that he didn't want to testify, why did you advise him that if he testified, cross-examination could range well beyond the few things--

A. Because that's my job--

Q. --he wanted to say--

A. To explain to defendants what could happen if they do testify.

Q. --it--

A. I don't stand in the way. Notwithstanding the fact that I may feel that somebody shouldn't testify, I still have an obligation to explain to them what could happen if they do testify.

In contrast, Petitioners said in his affidavit:

2. My attorney, L. Felipe Restrepo, interfered with my constitutional right to testify in my own defense by never advising me that the decision as to whether to testify was mine to make. Mr. Restrepo exercised his own will and made the decision that I would not testify. Had Mr. Restrepo advised me that the decision was mine, I definitely would have testified at my trial.

And then in his testimony in reference to previous criminal cases he was involved in, the notes of testimony reveal as follows:

Q. Okay. But you were aware, were you not, that you did have the right to testify in your own defense?

A. I was never asked to.

Q. All right. But you're aware you had the ability?

A. Oh, yea.

Q. And in--and in this particular trial, were you aware of that right?

A. I thought about--yes.

Other testimony pertinent to this § 2255 Motion follows:

Q. That's not my question, Mr. Sparacio. You do not recall telling Mr. Restrepo that you wanted to testify, isn't that correct?

A. I don't recall that, sir.

It is absolutely clear that counsel did not prevent Petitioner from exercising his right to testify. It is also clear that Petitioner knew he could testify if he wanted to.

Petitioner in his brief argues as follows:

Sparacio was confused as to why there was no severance. Sparacio was confused as to why he could not receive the plea agreement without Stanfa's guilty plea. Sparacio was confused as to his right to testify in the midst of a unified defense strategy. The burden of properly explaining the rights of the defendants should fall squarely on the shoulders of his attorney. Defense counsel should not say, "I never got the impression my client wanted to testify." Defense counsel should say, "we discussed it, I asked him and he said no." A lawyer cannot leave the explanation of his client's constitutional rights to chance. There was some confusion. Sparacio did not understand. Restrepo thought Sparacio

understood. Sparacio thought he had to follow the silence of the group. Although unfortunate, these situations can easily be prevented. Defense counsel must be clear in explaining a client their rights. There should not be a gray area, it should be black and white. Defendant's counsel should be able to exclaim to a tribunal "the client said no." The explanations should not be, "well, we discussed it and I didn't get the impression he wanted to testify."

This distorts what I have found to be the facts, and that is what is set forth in the affidavit and testimony of Mr. Restrepo as previously referred to.

As to the remaining ways (b) through (h) that Petitioner alleges counsel was ineffective, trial counsel has stated uncontradicted reasons for his decisions which clearly fall within the wider range of reasonable professional assistance.

As to (b), see paragraph 9 of the Restrepo affidavit.

As to (c), see paragraph 15 of the Restrepo affidavit.

As to (d), see paragraph 10 of the Restrepo affidavit.

As to (e), see paragraph 11 of the Restrepo affidavit.

As to (f), the record reveals that the court instructed the jury that the defendant has a constitutional right not to testify, and if he exercises it, the jury can draw no adverse inference. (N.T. of trial 11/15/95, 9:40 a.m., p. 238).

As to (g), see paragraph 13 of the Restrepo affidavit.

As to (h), see paragraph 14 of the Restrepo affidavit.

IfindthatalleightofPetitioner'sclaimsarewithoutmeritandthathehas
failedtodemonstratethatareasonablejuristwouldfindthiscourt'sconclusions
debatableorwrong.BecausePetitionerhasfailedtomakeasubstantialshowingofa
denialofaconstitutionalright,nocertificateofappealabilitywillissue.

Anorderfollows.

INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA

UNITEDSTATESOFAMERICA	:	CRIMINALNO.94-127-4
	:	
v.	:	CIVILNO.99-5381
	:	
SALVATORESPARACIO	:	

ORDER

ANDNOW,this22nddayofJanuary,2001,itisherebyORDEREDthat
Petitioner'sMotionUnder28U.S.C.§2255(DocketNo.1807)asamended(DocketNo.
1823)isDENIED.

Nocertificateofappealabilityshallissueforthereasonsstatedinthis
memorandum.

BYTHECOURT:

RONALDL.BUCKWALTER,J.